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No. 02-734

In the Supreme Court of the United States

PENN TRIPLE S, T/A PENN VENDING COMPANY AND MELODY VENDING SERVICE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

In 1996, the Food and Drug Administration (FDA) published regulations governing traditional cigarettes, which included restrictions upon the places where tobacco vending machines could be located. Before the date that the vending machine regulation was scheduled to go into effect, its implementation was enjoined by a district court. This Court subsequently held that the FDA lacked the authority to regulate traditional cigarettes, and the vending machine regulation was never enforced. Petitioners also filed separate suits contending that the vending machine regulation effected a temporary taking of their property. Those suits were dismissed by the Court of Federal Claims, and the court of appeals affirmed. The question presented is as follows:

Whether the court of appeals correctly held that no taking of petitioners' property occurred because implementation of the FDA's vending machine regulation was enjoined before its effective date and the regulation was never enforced.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-25) is reported at 304 F.3d 1349. The opinions of the United States Court of Federal Claims (CFC) are reported at 48 Fed. Cl. 866 and 49 Fed. Cl. 345 (Pet. App. 26-66).

JURISDICTION

The judgment of the court of appeals was entered on July 15, 2002. A petition for rehearing was denied on August 14, 2002 (Pet. App. 67-69). The petition for a writ of certiorari was filed on November 8, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT

1. On August 11, 1995, the Food and Drug Administration (FDA) issued proposed regulations "Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco Products To Protect Children and Adolescents." 60 Fed. Reg. 41,314, 41,453 (1995). *Inter alia*, the proposed regulations provided that tobacco products could be sold only to adults, and they required retailers to verify the age of persons wishing to buy tobacco products. The proposed regulations also "eliminate[d] 'impersonal' methods of sale that do not readily allow age verification, such as * * * vending machines." *Id.* at 41,315; see *id.* at 41,322-41,325. In support of its proposal to eliminate vending machines, FDA cited numerous studies indicating "that a significant percentage of adolescents are able to obtain their cigarettes from vending machines and that such purchases occur regardless of locks, warning signs, and other restrictions." *Id.* at 41,324-41,325.

On August 28, 1996, the FDA published its final regulations. 61 Fed. Reg. 44,396 (1996). The final regulations prohibited the sale of tobacco products to individuals under the age of 18 and required retailers to verify a purchaser's age by photographic identification. The final regulations did not entirely prohibit the sale of cigarettes from vending machines, however, but instead barred such sales "except in facilities where individuals under the age of 18 are not present or permitted at any time." *Id.* at 44,399; see generally *id.* at 44,426-44,462. The vending machine regulation was scheduled to become effective on August 28, 1997. Pet. App. 7.

In January 1997, the FDA sent a letter to retailers throughout the country, notifying them about the

tobacco regulations. 01-5120 C.A. App. A208-A212.[1] The letter and attachment explained that the age and identification requirements contained in the FDA regulations were scheduled to become effective on February 28, 1997, and that the vending machine regulation, as well as other provisions, was scheduled to become effective on August 28, 1997. See *id.* at A209. The letter did not suggest that the FDA would enforce the vending machine regulation before its August 28 effective date.

2. Various tobacco companies, advertisers, and retailers filed suit in the United States District Court for the Middle District of North Carolina, challenging the FDA's authority to regulate the tobacco industry. On April 25, 1997, the district court ruled that the FDA possessed the authority to issue all of the access restrictions. The court enjoined implementation of those regulations that had not yet become effective, however, including the vending machine regulation, pending interlocutory appeal of its ruling. *Coyne Beahm, Inc.* v. *FDA*, 966 F. Supp. 1374, 1397-1401 (M.D.N.C. 1997). The district court did not enjoin enforcement of the age and identification regulations, which had already taken effect. See *id.* at 1400. Accordingly, the FDA enforced those regulations through contracts entered into with state authorities. 01-5120 C.A. App. A220, A229.

On August 14, 1998, the United States Court of Appeals for the Fourth Circuit reversed the district court's judgment in *Coyne Beahm*, holding that the FDA was not authorized to regulate the tobacco industry. *Brown & Williamson Tobacco Corp.* v. *FDA*, 153

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[1] "01-5120 C.A. App." refers to the joint appendix filed in the court of appeals in *A-1 Cigarette Vending, Inc.* v. *United States*, No. 01-5120 (Fed. Cir.).

F.3d 155, 176 (1998). On March 21, 2000, this Court affirmed the judgment of the Fourth Circuit, concluding that "Congress has not given the FDA the authority that it seeks to exercise here." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000).

3. Petitioners are owners and operators of tobacco vending machine businesses. Pet. App. 6. They filed suit in the CFC, contending, *inter alia*, that the FDA's publication of the vending machine regulation had effected a temporary taking of their property. *Id.* at 8. Their suits were dismissed on the grounds that (a) the FDA's lack of statutory authority to issue the vending machine regulation precluded a takings claim against the United States, and (b) the regulation did not effect a taking of property because it was never enforced. See *id.* at 9-10.

4. The suits were consolidated on appeal, and the court of appeals affirmed. Pet. App. 1-25.

a. The court of appeals held that petitioners could not prevail on their takings claims because the vending machine regulation was never implemented or enforced. Pet. App. 17-20. The court stated that, notwithstanding the injunction entered by the district court in *Coyne Beahm*, petitioners remained free to offer evidence "that after the date the regulations technically went into effect, August 28, 1997, the FDA actually took steps to enforce them, in violation of the court order." *Id.* at 18. The court concluded, however, that petitioners "ha[d] not shown that any issue of disputed fact remains concerning whether the FDA enforced the regulations." *Id.* at 20. The court acknowledged that petitioners had offered "several declarations of operators of cigarette vending machines." *Id.* at 20 n.3. The court explained, however, that "[w]hile many of these declarations assert that state or local government

officials pressured them to remove vending machines from certain locations, none of the declarations state that the *FDA* enforced the regulations at any point, much less after they were to become effective." *Ibid.* The court declined to address the other grounds advanced by the government in support of the CFC's dismissal of the suits. *Id.* at 10-11.

b. The court of appeals also rejected petitioners' contention that they were entitled to discovery to determine whether the vending machine regulation was ever enforced. Pet. App. 21-22. The court observed that petitioners had "failed to demonstrate more than a 'speculative hope' of finding evidence to support their claim of enforcement." *Id.* at 22; see *id.* at 21 (noting the CFC's finding that petitioners had "produced absolutely no evidence to date to contradict the claim that the FDA did not enforce the tobacco vending machine regulations anywhere within the United States") (citation omitted). The court also explained that under Rule 56(g) of the Rules of the Court of Federal Claims (RCFC), "the party opposing the motion for summary judgment must file a sworn affidavit with the court stating the reasons that the party cannot respond to the motion without discovery. The [petitioners] in this case did not file such an affidavit." Pet. App. 21 (citation omitted).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. Petitioners seek review of the determination, endorsed by some but not all of the CFC judges who ruled in these cases, that petitioners' takings claims

against the United States failed because the FDA lacked statutory authority to issue the vending machine regulation. Pet. 6-10; see Pet. App. 9-10. That issue is not properly before this Court. The court of appeals affirmed the CFC's judgments on the ground that the vending machine regulation had never been enforced, and it specifically declined to address the government's alternative theories. See *id.* at 10-11. Because the court of appeals did not address the question whether the FDA's lack of statutory authority would preclude a takings claim, and because a ruling favorable to petitioners on that issue would not affect the court of appeals' judgment, the question is not properly presented here.

2. An as-applied claim that a non-discretionary regulation has taken property, entitling the claimant to recover just compensation, cannot be ripe before the regulation has actually become effective. See, *e.g.*, *Danforth* v. *United States*, 308 U.S. 271, 284, 286 (1939) (holding that mere enactment of legislation authorizing the taking of property at a later time is not a taking because the legislation could be repealed or modified, or appropriations could fail before it becomes effective). Because the FDA never implemented or enforced its vending machine regulation, the court of appeals correctly rejected petitioners' claims. Pet. App. 12-17.[2]

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[2] The possibility that potential contracting partners may have reacted to the FDA's announcement of the future implementation of the regulation by ceasing to do business with petitioners is irrelevant in the absence of an actual interference with petitioners' legal rights respecting their property. *Kirby Forest Indus., Inc.* v. *United States*, 467 U.S. 1, 15 (1984); *NBH Land Co.* v. *United States*, 576 F.2d 317, 318-319 (Ct. Cl. 1978). A taking can occur only when a final government regulatory act has actually restricted property rights. Cf. *United States* v. *Riverside Bayview*

Petitioners do not appear to dispute the court of appeals' holding that their takings claims cannot succeed absent proof that the FDA actually enforced its vending machine regulation. Rather, they contend that the CFC improperly denied them the opportunity to engage in discovery through which they might have acquired evidence of actual enforcement. The court of appeals correctly rejected that contention, holding that the CFC had not abused its discretion in denying discovery when petitioners (a) had produced no evidence that the vending machine regulation had ever been enforced, and (b) had failed to submit affidavits explaining why they could not respond to the government's motions for summary judgment without discovery. Pet. App. 21-22.[3]

Petitioners' argument on this score rests on a series of mischaracterizations of the court of appeals' opinion. First, there is no basis for petitioners' contention (Pet. 12) that the court of appeals ignored their declarations. To the contrary, the court of appeals specifically noted that petitioners had submitted "several declarations of operators of cigarette vending machines." Pet. App. 20 n.3. The court found that evidence to be unhelpful, however, because "none of the declarations state that the *FDA* enforced the regulations at any point." *Ibid.* The court also noted that petitioners had filed no affidavits explaining why discovery was needed to

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Homes, Inc., 474 U.S. 121, 126-127 (1985) (mere assertion of regulatory jurisdiction does not constitute a regulatory taking).

[3] As the court of appeals recognized (Pet. App. 22), the CFC's refusal to order discovery in this case is reviewed under an abuse-of-discretion standard. See *Keebler Co.* v. *Murray Bakery Prods.*, 866 F.2d 1386, 1388 n.1 (Fed. Cir. 1989); see also *Pierce* v. *Underwood*, 487 U.S. 552, 558-559 n.1 (1988) (noting that issues involving "supervision of litigation" are reviewed for abuse of discretion).

respond to the government's summary judgment motions. *Id.* at 21. That statement obviously was not an assertion that petitioners had filed no affidavits or declarations at all.

For much the same reasons, there is no merit to petitioners' assertion (Pet. 12) that "the court of appeals weighed the conflicting declarations and made findings of fact that there was no enforcement." The court of appeals did not make "findings of fact" or resolve any evidentiary dispute; rather, it concluded that petitioners had "not shown that any issue of disputed fact remains concerning whether the FDA enforced the regulations." Pet. App. 20. The court's assessment of the evidentiary record is correct, and in any event it raises no issue of broad importance warranting this Court's review. Nor is there any basis for petitioners' contention (Pet. 12) that, under the court of appeals' ruling, "a party seeking discovery to respond to a motion for summary judgment must prove his case before being entitled to discovery." The court of appeals in this case relied not only on petitioners' failure to present *any* evidence of actual FDA enforcement, but also on the fact that petitioners had "failed to avail themselves of the protection of RCFC 56(g) by not filing an affidavit explaining why they could not respond to the summary judgment motion without discovery." Pet. App. 22.[4]

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[4] There is no basis for petitioners' claim (Pet. 12) that the court of appeals' ruling in this case conflicts with the decisions in *Krieger* v. *Fadely*, 211 F.3d 134 (D.C. Cir. 2000), and *GAB Business Services, Inc.* v. *Syndicate 627*, 809 F.2d 755 (11th Cir. 1987). In *Krieger*, the plaintiff appealed from a district court's dismissal of his complaint under Federal Rule of Civil Procedure 12(b)(6). 211 F.3d at 135-136. *GAB Business Services* involved an appeal from a

Finally, this case is not plausibly characterized as one in which liberalized discovery is necessary "because the information needed to respond [to the government's summary judgment motion] is largely in the hands of the Government." Pet. 13. By definition, actual enforcement of the vending machine regulation would have involved coercive action taken against persons outside the government (such as petitioners themselves), who would necessarily have been aware that FDA enforcement efforts were ongoing. Yet, as the court of appeals explained, petitioners failed to offer "even a simple declaration from a witness stating that she knew from personal knowledge that the FDA had enforced the regulation." Pet. App. 20.[5]

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jury verdict. 809 F.2d at 757. Neither case presented any question concerning the proper standard for awarding summary judgment.

[5] The cases on which petitioners rely (Pet. 13) do not conflict with the court of appeals' decision here. *Gay* v. *Wall*, 761 F.2d 175, 177 (4th Cir. 1985), merely states that the non-moving party to a motion for summary judgment must be given a "reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Nothing in the decision dispenses with the specific requirements for justifying a request for discovery under Federal Rule of Civil Procedure 56(f). *Resolution Trust Corp.* v. *North Bridge Associates, Inc.*, 22 F.3d 1198, 1203 (1st Cir. 1994), states that such a discovery request requires a proffer setting forth "a plausible basis for believing that specified facts, susceptible of collection within a reasonable time frame, probably exist," to permit discovery under Fed. R. Civ. P. 56(f). Here, petitioners failed to demonstrate any "plausible basis" for "believing" that the FDA had ever enforced the vending machine regulation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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